ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
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Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
and	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

JOINT COMMENTS OF TELERGY, INC., ADELPHIA BUSINESS SOLUTIONS, INC., AND BUSINESS TELECOMMUNICATIONS, INC.

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Telergy, Inc., Adelphia Business Solutions, Inc. and Business Telecommunications Inc., ("Joint Commenters") submit these comments in the above-captioned proceeding in response to the Commission's notice of proposed rulemaking,[1] addressing the issues raised on the partial remand[2] of the Commission's *Collocation Order*[3] and those issues arising from the deployment of next generation network architecture by the incumbent local exchange carriers (LECs).

INTRODUCTION AND SUMMARY

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1 *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 00-297 (August 10, 2000)("*Collocation Reconsideration Order and NPRM*").

2 *GTE Service Corp v. FCC*, 205 F.3d 416 (D.C. Cir. 2000)("*GTE v. FCC*").

3 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, 14 FCC Rcd 4761 (1999)("*Collocation Order*"), *aff'd in part and remanded in part sub. nom. GTE v. FCC, supra.*

This proceeding provides the Commission an opportunity to promote the pro-competitive goals of the Telecommunications Act of 1996[4] by strengthening its collocation rules to ensure that the competitive LECs obtain the full benefit of collocated space and are not evicted from the premises of the incumbent LECs. Congress intended the Act to create competitive parity between incumbent and CLECs, imposing on incumbent LECs certain obligations, beyond those imposed upon other telecommunications carriers, to negotiate in good faith, to provide interconnection that is at least equal in quality to that which it provides itself, to provide nondiscriminatory access to unbundled network elements ("UNEs"), to offer resale of telecommunications services at wholesale rates, to notify other carriers of changes to its network, and to collocate on rates, terms and conditions that are just reasonable and nondiscriminatory.[5]

To date, the Commission has not exercised its full authority under section 251(c) to assure CLEC access to the premises of the incumbents. The Commission's seeming reluctance to assert its authority has played into the hands of incumbents. It is no coincidence that as incumbent LECs recognize the inroads CLECs are making in local exchange markets and the potential profitability of advanced telecommunications services, competitive barriers to collocation have risen commensurately. The incumbent LECs have sought to erect judicial, technological and practical barriers to impede CLECs efforts to collocate in central offices, remote terminals and other gateways to the networks of the incumbents. Section 251(c)(6) of the Act obligates incumbent LECs to "provide on terms and conditions that are just and reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled elements" at their premises. Incumbent LECs have not done so. Now that the Commission is faced with the task of revisiting its collocation rules, it should be guided by

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4 Pub. L. 104-104, 110 Stat. 56 (codified at various sections of Title 47 of the United States Code)("Act" or "1996 Act").

5 Section 251(c), 47 U.S.C. § 251(c).

the Act's overarching goal of competitive parity, tempered with the "benefit" of several years of competitive LEC collocation experience.

As the development of next generation telecommunications equipment becomes increasingly integrated and the deployment of the next generation network architecture pushes farther into America's neighborhoods, the Commission must implement rules that continue to promote competition. In *GTE v. FCC*, the C.C. Circuit Court invited the Commission to articulate a collocation policy that is consistent with the fair and ordinary meaning of the statute and to identify the statutory underpinnings for rules allowing collocation of multifunction equipment.

The Joint Commenters assert that the *entire* statute, *taken in context*, permits competitive LECs to collocate on the incumbent LEC's premises a full range of evolving telecommunications equipment, even multifunction equipment. Consistent with the pro-competitive goals of the Act, the Commission should define "equipment necessary for interconnection or access to unbundled network elements" as encompassing equipment that *enables* interconnection or access to the *features, functions, and capabilities* of UNEs. More specifically, use of the statutory term "necessary" is intended to broadly delegate to the Commission interpretive authority to differentiate between equipment that enables "interconnection or access to UNEs" from equipment that does not, in order to achieve competitive parity. Indeed, an incumbent LEC is obliged to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary [or] affiliate" on a "just, reasonable and nondiscriminatory" basis. Section 251(c)(2). The incumbent LECs also have a duty to provide access to UNEs on a "just, reasonable and nondiscriminatory" basis. Section 251(c)(3).

Thus, as the features, functions and capabilities of UNEs expand, so too must the scope of a collocating carrier's ability to *access* these UNEs. Access properly implies full use of UNEs. For "access" to be meaningful, the type of collocated equipment that can take advantage of the increased features, functions and capabilities of UNEs must correspondingly evolve. Line

sharing is but one example. Until recently, the bandwidth of a copper loop could not be split to allow for simultaneous voice and xDSL services without interference to the voice signal. Collocation of equipment that enables line sharing is a reasonable condition of access to the loop UNE. Moreover, collocation of such equipment does not increase the physical occupation of incumbent LEC premises where competitive LECs have already bought and built within that collocation space.

The Commission should make clear that an incumbent LEC's obligation to offer all of the features, functions, and capabilities of UNEs fully applies to evolving technologies, such as new optical loops and network facilities. At a minimum, the Commission should require incumbent LECs to offer as UNEs optical wavelengths and virtual paths between the central office and the customer's premises, and as subloop elements, whenever it is technically feasible to do so.

However, CLECs are at a disadvantage in identifying new network capabilities that should be offered as UNEs because incumbent LECs are not fully disclosing what those capabilities are. Current network disclosure rules essentially require only disclosure of what capabilities the incumbent LEC unilaterally plans to deploy, not the full capabilities of new network equipment. Under section 251, incumbent LECs must be required to disclose this information, including any manufacturer proprietary information, subject to non-disclosure agreements if necessary. The Commission should also require that incumbent LECs make reasonable upgrades of equipment that will provide beneficial new network capabilities that could be offered as UNEs.

The Commission should also reaffirm the obligation of incumbent LECs to permit cross-connects among CLECs on incumbent LECs' premises. Further, CLECs should be able to perform these cross-connects themselves. Section 251(c) does not explicitly limit collocation on incumbent LEC premises to interconnection *with the incumbent*. On the contrary, incumbent LECs are required to permit interconnection "that is at least equal in quality" to that which it provides itself. Section 251(c)(2)(C). Thus, to the extent that an incumbent LEC connects with

other CLECs, it must allow CLECs to use their collocation space to connect with each other. Moreover, all telecommunications carriers have a duty to interconnect directly or *indirectly* with other carriers. Section 251(a)(1). Forcing competitive LECs to interconnect beyond the premises of the incumbent LEC, where CLECs necessarily "congregate," is not only inefficient but also introduces miles of additional and costly transport along which technical problems impacting network reliability that could develop. Reduction of these unnecessary points of failure will increase inter-network reliability. As suggested by the inclusion of *indirect* forms of interconnection in the statute, Congress understood the efficiencies that proximity lends to cross-connection, and the Commission may properly consider those efficiencies in mandating CLEC access to ILEC premises for the purpose of cross-connection.

Finally, if an incumbent LEC uses copper at any point in the provision of telecommunications service from a given central office, the Commission should require the incumbent to maintain, and to offer as UNEs to competitive LECs, copper loops to safeguard competition in the provision of advanced telecommunications services.

ARGUMENT

By enacting the Telecommunications Act of 1996, Congress sought to establish a legislative framework to open to competition the monopoly local exchange telecommunications market and to accelerate deployment of advanced telecommunications services to all Americans.[6] To this end, Congress imposed on the incumbent LECs specific duties to interconnect with other telecommunications carriers, to provide access to network elements, and to permit physical collocation. The Commission must implement these duties in a manner consistent with the Act's goal of promoting competition in local telecommunications service markets.

The Joint Commenters urge the Commission to implement collocation rules that assure competitive parity with the incumbents, looking to the broader goals of the 1996 Act, and to reject incumbent LEC arguments for a narrow reading of their obligations in isolation. Regulations governing collocation on incumbent LEC premises that embody the 1996 Act's pro-competitive goals must permit collocation of a full range of evolving telecommunications equipment to accommodate contemporary as well as next generation network architectures.

I. THE COMMISSION SHOULD BE GUIDED BY THE PURPOSE OF THE ENTIRE ACT IN DETERMINING WHAT EQUIPMENT MAY BE COLLOCATED ON ILEC PREMISES.

The Commission is now faced with the task of revisiting portions of its implementation of section 251(c)(6) of the Communications Act of 1934, as amended,[7] providing for collocation of CLEC equipment on the incumbent LECs' premises. Section 251(c)(6) imposes on incumbent LECs:

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[6] S. Conf. Rep. No. 104-230, at 1 (1996) (The 1996 Act is intended to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition"). *See also Iowa Utils Bd. v. FCC*, 120 F.3d 753, 791 (8th Cir. 1997) (stating that Congress passed the 1996 Act, in part, "to erode the monopolistic nature of the telephone industry by obligating [incumbent LECs] to facilitate the entry of competing companies into local telephone service").

[7] 47 U.S.C. §§ 151 *et seq.*

> "The duty to provide, on rates, terms and conditions that are just reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."

In its 1999 *Collocation Order*, the Commission promulgated rules to implement section 251(c)(6). With regard to the type of equipment that CLECs may collocate on incumbent LEC premises, the Commission interpreted the phrase "equipment necessary for interconnection or access to unbundled network elements" in section 251(c)(6) to mean that CLEC equipment may be collocated on incumbent LEC premises if it is "'used or useful' for either interconnection or access to unbundled network elements, regardless of other functionalities inherent in such equipment."[8]

Several incumbent LECs challenged the breadth of the Commission's interpretation before the D.C. Circuit Court of Appeals. The court rejected the FCC's interpretation of "equipment necessary for interconnection or access to unbundled network elements" as equipment that is "used or useful" because it was, according to the court, outside the ordinary and fair meaning of the statute's terms. The court's analysis of section 251(c)(6) led it to conclude that Congress did not speak directly to the specific issues on review, that there was no "plain meaning" of the statute given the complexity of the issues, and that the specific terms in dispute were ambiguous. The court asserted that, under section 251(c)(6), LECs must provide physical collocation of equipment necessary for interconnection or access to unbundled network elements "and nothing more." "[S]tatutory reference to 'necessary' must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit 'necessary' to that which is required *to achieve a desired goal.*"[9] Joint Commenters submit that the desired, and appropriate, goal is competitive parity.

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8 14 FCC Rcd at 4776-77, ¶ 28.

9 *Id.* at 423 (emphasis added).

The court did not vacate, however, those portions of the *Collocation Order* and rules to the extent that they required LECs to provide collocation of competitors' equipment that is "directly related to and thus necessary, required, or indispensable to 'interconnection or access to unbundled network elements.'" Anything beyond this, the court cautioned, *"demands a better explanation from the FCC."*[10] The Commission has the opportunity to provide one. Given the circumstances, a permissible agency interpretation, such as the Joint Commenters advocate, would merit judicial deference on appeal where it is reasonable and consistent with the statutory purpose.

II. THE STATUTE PERMITS COLLOCATION OF EQUIPMENT THAT ENABLES TELECOMMUNICATIONS SERVICE WHERE SUCH AN INTERPRETATION IS DEMONSTRABLY SQUARED WITH THE ACT

By considering the entirety of section 251(c)(6) in the context of the 1996 Act, the Commission should conclude that CLECs may collocate on incumbent LEC premises equipment that enables telecommunications, despite its other functions.

For the second time in as many years, the Commission must reconsider, at the direction of the federal judiciary, its interpretation of the term "necessary" as used in the 1996 Act. On the first occasion, *Iowa Utilities Board v. FCC,* the Supreme Court instructed the Commission to reinterpret the term "necessary" as found in section 251(d)(2) because the Commission's interpretation lacked any limiting standard.[11] Similarly, in the case giving rise to the present proceeding, *GTE v. FCC*, the D.C. Circuit found that the Commission's interpretation of "necessary" as contained in section 251(c)(6) was "overly broad and disconnected from the statutory purpose."[12]

The Commission is not the first to struggle with the possible interpretations of the term "necessary." For more than one hundred and fifty years, courts and administrative agencies have

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10 *Id.* at 424 (emphasis added).

11 119 S.Ct. 721, 736 (1999).

12 205 F.3d 416 (D.C. Cir. 2000).

set upon the task of determining the proper interpretation of "necessary" in various constitutional and statutory contexts. When Justice Marshall considered the meaning of "necessary" in the seminal case *M'Culloch v. Madison*, he noted that "[t]his word, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view."[13] In context, the meaning of the term necessary has varied from "indispensable" to "convenient and appropriate" to "afford[ing] new LECs a competitive opportunity in the telecommunications market."[14]

The term "necessary" does not occur in isolation, and proper interpretation requires an examination of the context in which the word is used. Joint Commenters assert that section 251(c)(6) confers broad authority on the FCC to impose a full range of meaningful collocation obligations on incumbent LECs. First, the pro-competitive principals of the Act support a broad reading of the term "necessary" as used in 251(c)(6). Second, the term "necessary" must be understood in the context of the evolving terms "interconnection and "access to unbundled network elements." Third, the obligation to collocate on terms, rates and condition that are just, reasonable and nondiscriminatory, implies that Congress sought to provide CLECs a meaningful opportunity to compete, in a manner sensitive to the conflicting role incumbents have as a retail local exchange service competitor and a wholesale supplier to CLECs. Consequently, adoption of rules that allow CLECs to collocate equipment that enables telecommunications services would create competitive parity between incumbent LECs and CLECs and best suit Congress' goal to open local exchange markets to competition under the Act.

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13 *M'Culloch v. Madison*, 17 U.S. 316, 415 (1819).

14 *See, e.g., M'Culloch v. Madison*, 17 U.S. 316, 413-14 (1819). (necessary does not mean absolutely essential, rather it means expedient to task at hand, as used in the Constitution's "necessary and proper" clause); *RT Communications v FCC*, 201 F.3d 1264 (10th Cir. 2000) (preemption was "necessary" within the meaning of section 253(d) of the 1996 Act "to afford new LECs a competitive opportunity in the telecommunications market"); *United States v. Barker*, 553 F.2d 1013, 1020 (6th Cir. 1977) (necessary means "relevant, material and useful" as used in section 17(b) Federal Rules of Criminal Procedure, requiring issuance of subpoena if presence of witness is necessary to the defense); *In re Lyall*, 193 B.R. 767 (Bankr. E.D. Va. 1996) (a debtor's vehicle is "necessary" under the Va. Code 1950 Sec. 34-26(7) where without it the debtor would be "unable to effectively compete" in his occupation); *Fleming v. A.B. Kirschbaum Co.*, 124 F.2d 567 (3rd Cir. 1941) (necessary means, not indispensable, but convenient and appropriate, as used in the Fair Labor Standards Act of 1938, 29 USCA Secs 206, 207);

A. "The Necessary Standard" Should Embody The Pro-competitive Goals Of The Act

1. The Commission Has Authority To Adopt A Rules For Collocation That Provide CLECs A Meaningful Opportunity To Compete.

In adopting rules interpreting the scope of collocation of equipment "necessary for interconnection and access to unbundled network elements," the Commission ought to start with the court's rejection of the requirement that incumbent LECs collocate any competitors' equipment that is "used or useful."[15] Therein, the court noted that the Commission's rules failed to provide a limiting standard implied by the term "necessary," remarking that incumbents could be forced to collocate CLEC equipment performing functions unrelated to interconnection or access to UNEs, such as payroll, accounting, or marketing.[16] The court, however, did not require the Commission to adopt a particular definition. Rather, the court instructed the Commission that a statutory reference to the word necessary must be construed in a fashion that is consistent with the ordinary and fair meaning of the word and that anything beyond requiring collocation of competitors equipment that is "directly related to and thus necessary, required or indispensable" to interconnection or access to UNEs, "demands a better explanation from the FCC."[17]

As mentioned above, judicial decisions reveal that the varied "fair and ordinary" meaning of the word necessary depends on context. For instance, the Supreme Court has interpreted the phrase "public convenience and necessity," as used in numerous statutes, to delegate broadly congressional authority to agencies in formulating regulatory policy.[18] In these cases, and countless others, the term "necessary" has not required absolute indispensability but, rather, has

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15 205 F.3d at 422.

16 *Id.* at 423.

17 *Id.* at 423-24.

18 *See, e.g., Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974); *Shaeffer Transportation Co. v. United States*, 355 U.S. 83 (1957); *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945); *ICC v. Parker*, 326 U.S. 60, 65-66 (1945); *Denver & Rio Grande R..R.. Co v. United States*, 312 F. Supp. 329, 332-333 (D. Colo. 1970), *aff'd mem.*, 400 U.S. 921; *United Air Lines, Inc. v. Civil Aeronautics Board*, 198 F.2d 100 (7th Cir. 1952).

been satisfied by such considerations as "the desirability of *competition*, the desirability of *different kinds of service*, and the desirability of *improved service*."[19] One of the more illuminative and oft cited discussions of the word "necessary" was penned by the Supreme Court of Illinois in *Wabash, Chicago & Western Ry. Co. v. Commerce Commission*,[20] which provides:

> the word "necessity" is not used in its lexicographical sense of "indispensably requisite." If it were, no certificate of public convenience and necessity could ever be granted. The first telephone was not a public necessity under such definition, nor was the first electric light. Even the construction of a waterworks system in a village is seldom necessary, though highly desirable. However, any improvement which is highly important to the public convenience and desirable for the public welfare may be regarded as necessary. If it is of sufficient importance to warrant the expense of making it, it is a public necessity.[21]

Where, as here, Congress has codified its desire for a competitive local exchange service market – in what had historically been the domain of titanic, entrenched monopoly providers -- a broad reading of "necessary for interconnection or access to UNEs" best suits Congress' purpose.

The circumstances under which the Commission came upon its collocation authority demonstrate Congress' resolve to provide the Commission with the required tools to effectuate competitive local exchange service. In 1993, the Commission first required certain LECs to

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19 *Nashua Motor Express v. United States*, 230 F. Supp. 646, 652 (D.C., N.H. 1964) (three-judge panel); *see also, e.g., Bowman. v. Arkansas-Best, supra,* (endorsing increased intramodal competition as permissible element of public convenience and necessity); *United States v. Dixie Express*, 389 U.S. 409 (1967) (same); *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953)(same under Communications Act); *Eastern Air Lines, Inc. v. CAB*, 271 F.2d 752, 759 (2d Cir. 1959)(where agency, based upon its own expert knowledge of the industry under its control, determines that competition in and of itself is a desirable objective, that determination must be upheld); *Petroleum Carrier Corporation v. United States*, 258 F. Supp. 611 (D.C., M.D. Fla. 1966)(three-judge panel). *Cf. A.B. & C. Motor Transp. Co., Inc. v. United States*, 69 F. Supp. 166 (D.C. Mass. 1946)("[a]n increase in competition is not a reason for denying the Commission's authority to issue a certificate.)"

20 141 N.E. 212 (Ill. 1923).

21 *Id.* at 218; *see also, e.g., Chesapeake & Ohio Ry. v. United* States, 283 U.S. 35, 42 (1931); Zachs *v. Department of Public Util.*, 547 N.E.2d 28, 32 (Mass. 1989); *Thomson v. State Commerce Commission*, 15 N.W.2d 603 (Iowa, 1944); *Kenneson v. City of Bridgeport*, 33 A.2d 313, 314 (Conn. 1943); San *Diego & Coronado Ferry Co. v. Railroad* Commission, 292 P. 640, 643 (Cal. 1930); *Yazoo & M.V.R. Co. v. Public Service Commission*, 128 So. 39, 40 (Louisiana, 1930); *Wisconsin Telephone C. v. Railroad Commission*, 156 N.W. 614 (Wisc. 1916); Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States*, 79 Colum. L. Rev. 426 (1979) (tracing history of the term "public convenience and necessity").

provide physical collocation in its *Expanded Interconnection Order*[22] pursuant to section 201 (a) of the Act.[23] Section 201(a) made it the "duty of every common carrier" where the Commission where finds "action necessary or desirable in the public interest. . . to establish physical connections with other carriers. . ." [24] On review, the D.C. Circuit found that the Commission lacked the express delegation of authority under section 201(a) of the Act to order physical collocation.[25] The court found that while the "Commission's power to order 'physical connections' [under section 201,] undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices."[26] As a result, the court found that "deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen."[27] Therefore, absent a more definite congressional authorization, the court was unwilling to defer to the FCC's unduly broad reading of section 201(a). As a result, the court remanded the Commission's decision to the Commission. In direct legislative response, Congress passed the 1996 Act containing section 251(c)(6), that in combination with it general rulemaking authority, provided the Commission with the specific statutory authority to require physical collocation that was missing from section 201(a). Thus, consistent with the goals of the Act, the term "necessary" as it appears in section 251(c)(6) should be read broadly to fulfill Congress' desire to expand the Commission's collocation authority.

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22 *Expanded Interconnection with Telephone Company Facilities*, First Report and Order, 7 FCC Rcd 7369 (1992) ("Expanded Interconnection Order"), *vacated in part and remanded, sub nom., Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

23 47 U.S.C. § 201(a).

24 47 U.S.C. § 201(a).

25 *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994)(*BA v. FCC*).

26 *BA v. GTE*, 24 F.3d at 1446.

27 *BA v. FCC* 24 F.3d at 1445; *see also GTE v. FCC* 205 F.3d at 419

Further support of the FCC's broad discretion under section 251(c)(6) can be inferred from the Supreme Court's decision in *National Railroad Passenger Corp. v. Boston and Maine Corp.*[28] There, the court upheld the ICC's interpretation of the condemnation provisions of the Rail Passenger Service Act, which authorized the ICC, at the request of Amtrak, "to condemn [freight railroad] property . . . *required* for intercity rail passenger service."[29] Based on this statutory authority, the ICC had condemned an entire fee interest in a parcel property, notwithstanding that: (1) such property was *not* indispensable to Amtrak's operations; (2) Amtrak could have provided the same service with a leasehold interest (*i.e.*, trackage rights); and (3) Amtrak intended not to retain the fee interest, but instead planned to reconvey the fee to a third party. Rejecting the court of appeals' interpretation of the term "required" as meaning "indispensable to Amtrak's operations,"[30] the Supreme Court upheld the ICC's less restrictive interpretation of "required" to mean "useful or appropriate."[31] In support of its decision, the court cited Chief Justice Marshall's interpretation of the word "necessary" in *McCulloch, supra*, reading the word "'necessary' to mean 'convenient, or useful,' and rejecting a stricter reading of the term which would have limited congressional power under the Constitution to the 'most direct and simple' means available."[32]

Any incumbent LEC suggestion to interpret "necessary" to mean "required or indispensable" should be rejected as inconsistent with the pro-competitive goals of the Act and because it creates a logical fallacy. If "necessary" is interpreted narrowly to mean "required or indispensable," as only permitting collocation of the physical minimum equipment to

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28 503 U.S. 407 (1992) ("*NRPC v. Boston and Maine*"), *rev'g Boston and Maine Corp. v. ICC*, 911 F.2d 743 (D.C. Cir. 1990).

29 45 U.S.C. § 562(d)(1). The need for the property sought by Amtrak was deemed to be established *unless* the ICC found that the conveyance of the property would impair the ability of the freight railroad to carry out its common carrier obligations, or if Amtrak could adequately be met by the acquisition of some alternative property available on reasonable terms. *Id.* at §562(d)(1)(A)-(B).

30 *Id.* at 417.

31 *Id.* at 418.

32 *Id.* at 419.

interconnect or to access UNEs, section 251(c)(6) would be rendered meaningless. As the FCC found in the *Local Competition First Report and Order*, collocation itself is not absolutely required for interconnection or access to UNEs, because alternative methods for interconnection and access exist, *i.e.*, "meet point" interconnection.[33] Thus, if "necessary" modifies the type of equipment to be used for interconnection or access, as opposed to ILEC *obligations* imposed for interconnection by section 251(c)(2) and access to UNEs by section 251(c)(3), then arguably *no* equipment could meet the requirements of section 251(c)(6). Following this flawed argument to its conclusion, collocation for interconnection and access would not be permitted pursuant to section 251(c)(6) because collocation is not, strictly speaking, indispensable or required for such interconnection or access. As discussed below, so too must the Commission discard the interpretation of the term "necessary" as used in section 251(d).

a. The "Necessary Standard" Adopted in the UNE Remand Order Is Not Appropriate in the Context of Section 251(c)(6)

In the *Collocation Reconsideration Order and NPRM*, the Commission asked for comment on whether it should adopt the definition of necessary that it employed in the *UNE Remand Order* concerning access to proprietary network elements under section 251(d)(2)(A).[34] In the *UNE Remand Order*, the Commission defined necessary as "if taking into consideration the availability of alternative elements outside the incumbent's network . . . lack of access to that element would . . . preclude a requesting carrier from providing the services it seeks to offer."[35] Because this standard was designed for application in the context of section 251(d)(2)(A), the Commission should not mechanically apply this standard to section 251(c)(6). The seemingly similar goal to be achieved under section 251(d)(2)(A), the identification of network elements

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33 That is interconnection at the demarcation point between networks. In other words, one network ends where the other begins.

34 *Collocation Reconsideration Order and NPRM*, para. 75.

35 *UNE Remand Order*, para. 44.

that incumbent LECs must make available, is significantly different than the goal under section 251(c)(6), identification of equipment that incumbent LECs must permit to be collocated within their premises. Here, by definition, Congress has already determined that collocation is necessary for CLECs to compete effectively with incumbent LECs. Upon closer examination, the structure of these two standards points to these differences. Section 251(d)(2)(A) is modified by the "impair" standard of section 251(d)(2)(B) that applies generally to UNEs. Thus, the standard articulated in section 251(d) creates a quite narrowly focused form of protection. In contrast, section 251(c)(6) sets forth the various duties that the incumbent LECs have to collocate equipment necessary for interconnection and access to network elements.

Section 251(d)(2)(A) is intended to protect the "proprietary" rights of the incumbent LECs, for which determining just compensation for a taking can be difficult. In contrast, the value of the "property" rights protected under section 251(c)(6), space in the incumbent's premises, is much more readily assessable, and in fact, the incumbent LECs are being compensated rather handsomely. Joint Commenters submit that Congress intended to afford "proprietary rights" more protection than "property" rights in section 251. Consequently, the term "necessary" as used in section 251(d)(2)(A) implies a significantly stricter standard than does the term as used in section 251(c)(6). In any event, the inability to collocate equipment that enables interconnection or access to UNEs would preclude CLECs' ability to provide service and, therefore, would meet event the restrictive standard of the *UNE Remand Order.*

Accordingly, in determining a limiting standard from the term "necessary" as used in section 251(c)(6), the Commission is not bound by the most restrictive possible definition of the term, but rather is able to exercise its discretionary authority as an expert agency to advance the overall pro-competitive goals of the Act.

2. "Interconnection" and "Access to UNEs" Should Be Considered In Their Broader Sense

The appropriate limiting standard for equipment necessary for "interconnection and access to unbundled network elements" should accommodate a broad concept of the terms comprising "interconnection" and "access to unbundled network elements." To be sure, physical collocation rules must be closely related to the statutory purposes of 251(c)(2) and (3), which in turn set limiting parameters on the definition of "necessary" in particular, and the ILEC obligation in section 251(c)(6) in general, which would satisfy the admonitions of the Supreme Court and D.C. Circuit. The limiting factors inherent in the related provisions on interconnection (section 251(c)(2)) and unbundling (section 251(c)(3)), as well as section 251(c)(6) itself, set the bounds of permissible collocation. First, physical collocation is not an obligation where it is not practical due to *space limitations*. Second, physical collocation is not an obligation where it is *not technically feasible*. Third, only *requesting telecommunications carriers* are entitled to collocation. Fourth, collocation for interconnection purposes must be used for *the transmission and routing of local exchange service or exchange access*. Lastly, collocation for the purpose of access to UNEs must be used for the *provision of a telecommunications service*.

Moreover, the structure of 251(c)(6) indicates that the term "interconnection" is intended to convey a more expansive requirement than merely collocation of equipment for simple interconnection to the incumbent LEC network. The inclusion of the phrase "or access to unbundled network elements" after "interconnection" broadens the scope of equipment that may be collocated in the incumbent LEC premises beyond that necessary solely for interconnection. Thus, it appears that Congress understood that CLECs would need to collocate equipment in the incumbent LEC premises for a variety of purposes. Had Congress intended to restrict the scope of permissible collocation required in the incumbent LECs' premises under section 251(c), it would have also expressly limited the duty to interconnect both directly and indirectly created in section 251(a)(1) to that of simple wiring.

The Commission should view "access to UNEs" as encompassing any interaction with the features, functions, and capabilities of those UNEs. The Act defines network elements as including their "features, functions, and capabilities."[36] Access to UNEs implies meaningful use of those UNEs. In order to access their functionalities, CLECs must employ equipment that is capable of interacting with those features, functions, and capabilities. Therefore, any such equipment meets the statutory necessary test because it enables CLECs to access those features, functions, and capabilities of the UNEs. As incumbent LECs employ more advanced electronics in loops and central offices, the range of equipment that CLECs may collocate correspondingly increases. Indeed, incumbent LECs are now increasingly deploying data equipment and optical systems as integrated part of loops and other UNEs. As described elsewhere in these comments, the Commission should designate a number of new UNEs concerning incumbent LECs' deployment of next generation architectures. The Commission should further determine that any equipment that interacts with any of the capabilities of these new UNEs is necessary for "access to UNEs."

3. The Authority To Ensure That Collocation Is Just, Reasonable and Nondiscriminatory Empowers the Commission To Implement Rules Designed To Place ILECs and CLECs At Competitive Parity With Regard To Access To ILEC Premises.

Section 251(c)(6) of the Act requires incumbent LECs to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[37] As described above, the term "necessary" modifies the phrase "for interconnection and access to unbundled elements."[38] The term "necessary" therefore comprehends the entire scope of the interconnection and network

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36 47 U.S.C. § 3(29).

37 47 U.S.C. § 251(c)(6).

38 *Id.*

access obligations imposed in section 251(c)(2)-(3), which obligations are further detailed in those subsections. Thus, section 251(c)(2) requires incumbent LECs to provide interconnection "that is *at least equal* in quality to that provided by the local exchange carrier *to itself* or to any subsidiary [or] affiliate," and "on rates terms and conditions that are just and reasonable and nondiscriminatory."[39] Section 251(c)(3) similarly obligates incumbent LECs to provide access to network elements on "rates terms and conditions that are just and reasonable and nondiscriminatory. . . ." 47 U.S.C. § 251(c)(3). And once collocation is deemed necessary, section 251(c)(6) reaffirms the incumbent LECs obligation to provide collocation on terms and conditions that are "just and reasonable and nondiscriminatory." 47 U.S.C. § 251(c)(6). Therefore, the Commission should be free to adopt generic collocation requirements based on pervasive evidence of discriminatory use of collocation space, vis-a-vis the incumbent LECs or its affiliates, and denial of competitive access to CLECs.

So far, under the 1996 Act, the Commission has not sought to exercise its full authority under section 251(c)(6) to prescribe adequate rules to assure incumbent LECs offer collocation on reasonable terms and conditions and nondiscriminatory physical collocation in incumbent LEC central offices. The Commission has authority to require competitive parity between incumbent LECs and CLECs with respect to occupation and use of incumbent LEC central offices and remote terminals. In fact, it would be hard to overstate the breadth of the Commission's authority to prescribe reasonable terms and conditions for collocation and to prevent undue discrimination by the incumbent LECs against CLECs in providing collocation of equipment deemed "necessary" for interconnection or access to UNEs.

The basic regulatory standard of reasonableness and nondiscrimination expressed in the 1996 Act is a common feature of virtually all federal regulatory statutes, including the Interstate Commerce Act ("ICA"),[40] the Natural Gas Act,[41] and the Federal Power Act,[42] as well as other

[39] 47 U.S.C. § 251(c)(2)(C)-(D) (emphasis added).

[40] 49 U.S.C. §§ 2, 3(1) (1977).

[41] 15 U.S.C. §§ 717 *et seq.*

portions of the Communications Act. Courts have observed repeatedly that the all-embracing statutory proscription against "undue" or "unreasonable" discrimination comprehends *every* form of unreasonable discrimination within the power of Congress to condemn.[43] The Supreme Court has described the purpose of Congress in adopting such language was "to cut up by the roots *every* form of discrimination, favoritism and inequality."[44] Historically, the courts have upheld the Commission's broad authority not only *to define the scope* of discrimination deemed unreasonable, but also *to fashion remedies* based on just and reasonable terms and conditions of service.[45]

The anti-discrimination provisions of federal statutes have justified agency action *far* more sweeping than merely establishing rules requiring nondiscrimination in the provision of collocation space. For example, the Federal Energy Regulatory Commission ("FERC") sought to restructure the natural gas industry based *solely* on its longstanding authority to prevent "undue" discrimination under section 5 of the Natural Gas Act ("NGA").[46] In *Associated Gas Distributors v. FERC*,[47] the court upheld imposition of "open access" requirements on vertically integrated, producer-owned or affiliated pipelines, which eliminated overnight a longstanding industry structure permissible under the NGA and required pipelines – *for the first time* – to act as common carriers, transporting gas for third party shippers on the same terms and conditions that they did for themselves.[48] Recently, in *Transmission Access Policy Study Group v. FERC*,

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42 16 U.S.C. §§ 824.

43 *See, e.g., Merchants Warehouse Co. v. United States*, 283 U.S. 501, 512 (501); *Louisville & Nashville R.R. Co. v. United States*, 282 U.S. 740, 749-750 (1931).

44 *See, e.g., Louisville & Nashville R.R. Co. v. Mottley*, 219 U.S. 467, 478 (1911)(emphasis added) (under section 202(a) of the Communications Act of 1934).

45 *See, e.g., National Association of Motor Bus Owners v. FCC*, 460 F.2d 561, 565 (D.C. Cir. 1974).

46 15 U.S.C. §717(d); *See Associated Gas Distributors v. FERC*, 824 F.2d 981. 998 (D.C. Cir. 1986).

47 824 F.2d 981 (D.C. Cir. 1986).

48 Acknowledging that the NGA imposed no explicit "common carrier" obligation on pipelines – in contrast to railroads or telecommunications carriers – the court nonetheless upheld the open access requirement, noting that "the Act fairly bristles with concern for undue discrimination." *Id.* at 998.

the court sustained an even more sweeping restructuring of the electric industry, based on a broad interpretation of the similar anti-discrimination provisions of the Federal Power Act ("FPA").[49] In that case, the court upheld imposition of an *involuntary* retail wheeling obligation on all public utilities with transmission facilities based largely on anecdotal findings of discrimination and denials of competitive access to transmission facilities by large integrated power companies.[50]

Under the 1996 Act, Congress gave the Commission broader authority to prevent discrimination than that conferred under the other statutory schemes discussed above (*including* its prior delegation to the Commission under section 202(a) of the Communications Act of 1934).[51] The Commission has recognized the prohibition against discrimination that appears throughout section 251 is unqualified and absolute; unlike the other statutes discussed above, section 251 does not qualify the term "nondiscriminatory" with the words "undue" or "unjust and unreasonable."[52] Such increased watchfulness is justified because incumbent LECs (and their affiliates) hold the dual role of wholesale supplier to and retail competitor of CLECs. By requiring incumbent LECs to provide interconnection to their competitors, the Act creates an incentive "for the LEC to discriminate against its competitors by providing them with less favorable terms and conditions of interconnection than it provides itself."[53] Provision of "interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be 'just' and 'reasonable' under section

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49 16 U.S.C. § 824d-e.

50 *See Transmission Access Policy Study Group v. FERC*, 2000 WL 762706 (D.C. Cir. 2000). The breadth of the court's interpretation of the FPA anti-discrimination provisions in *Transmission Access Policy Study Group* is particularly noteworthy. For, previously, the Supreme Court, holding that electric transmission companies were subject to the Sherman Antitrust Act, had ruled that the Federal Power Commission *lacked* authority to require wheeling. *See Otter Tail Power Company v. United States*, 410 U.S. 366 (1973). Numerous other courts had echoed this notion in striking down attempts by the FERC to impose a generic wheeling requirement. *See Florida Power & Light v. FERC*, 660 F.2d 668 (5th Cir. Unit B Nov. 1981); *New York State Electric & Gas Corp. v. FERC*, 638 F.2d 388 (2d Cir. 1980); *Richmond Power & Light v. FERC*, 574 F.2d 610 (D.C. Cir. 1978).

51 *See Local Competition Order* at ¶ 218.

52 *Id.*

53 *Id.*

251(c)(2)(D)."[54] The inherent conflicting incentives of the incumbent's wholesale and retail arms warrant the Commission's full and vigilant protection against discrimination. Accordingly, section 251(c)(6) authorizes the Commission to impose generic, yet stringent, collocation requirements to guard against discrimination and ensure competitive access to the incumbent LEC's premises.

B. Any Commercially Available Equipment that Enables Interconnection or Access to UNEs Meets the "Necessary" Test

Consideration of all of the components of section 251(c)(6) together with the goals of the 1996 Act should lead the Commission to conclude that equipment that *enables* interconnection or access to UNEs meets the "necessary test." Equipment used to obtain interconnection or access to UNEs, would be, in the words of the D.C. Circuit, "indispensable"[55] for, or alternatively, "directly related to"[56] interconnection or access to UNEs, because without such equipment, CLECs may do neither. Such equipment meets the statutory test of necessary for interconnection or access to UNEs because it enables interconnection and access to UNEs by virtue of capabilities and functions that make possible such interconnection or access.

Many contemporary telecommunications products on the market have the capability to enable interconnection or access to UNEs. The Commission should reject any incumbent LEC proposal to narrowly define the types of equipment that enable interconnection or access to UNEs. Instead, the only practical test that the Commission could administer is to let the marketplace determine the equipment that enables interconnection or access to UNEs. In other words, if the equipment is commercially available and it enables interconnection or access to UNEs, it may be collocated. Absent reliance on the marketplace to prescribe equipment enabling interconnection or access the UNEs, the Commission could potentially become embroiled in the

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54 *Id.*

55 *GTE v. FCC*, 205 F.3d at 424.

56 *Id.*

detailed examination and design of telecommunications equipment. Further, allowing the marketplace to define what equipment enables interconnection or access to UNEs lessens the possibility that incumbent LECs would be able to use equipment classifications,[57] evaluations and testing as another tool for delaying competition.

Specifically, CLECs should be allowed to collocate equipment that provides packet switching or routing, such as Digital Subscriber Line Access Multiplexers (DSLAMs), routers, asynchronous transfer mode ("ATM") multiplexers, and remote switching modules necessary to the provision of advanced services.[58] While such equipment clearly enables interconnection and network access, it is also essential to the provision of advanced telecommunication services. Moreover, incumbent LECs--who are under an obligation to provide interconnection at least equal in quality to that which they provide themselves--are increasingly installing this type of equipment, which provides interconnectivity between the local loop and transport.

Incumbent LECs will erroneously contend that such equipment provides switching, and thus is not necessary for interconnection and network access, relying on the Commission's suggestion in its *Local Competition Order*, that "we do not impose a general requirement that switching equipment be collocated since it does not *appear* that it is used for actual interconnection or access to unbundled network elements.[59] However, such a distinction is based on an incomplete concept of "interconnection" and "network access," and results in an unduly narrow view of the function of switching. Such a limited definition of switching is no longer supported by Commission precedent and is not an accurate characterization of the functions served by modern DSLAMs, routers and ATM switches.

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[57] Incumbent LECs are currently attempting to classify certain equipment used in data communications as switching equipment in an effort to exclude it from eligibility for collocation and to disadvantage competitors. An inability of CLECs to collocate the most advanced and efficient equipment, even as incumbent LECs themselves deploy it, would cause serious competitive harm to CLECs. As explained, however, the functionality of this equipment is integral to interconnection and access to UNEs and, therefore, eligible for interconnection under the statute.

[58] *Collocation Reconsideration Order and NPRM* at ¶ 72.

[59] *Local Competition Order* at ¶ 581.

Even if the above-referenced equipment could successfully be characterized as performing a switching function, the conclusion that switching equipment serves no interconnection or network access function incorrect and thinly supported only by outdated regulatory pronouncements. As discussed above, the Act supplies no fixed definition of "interconnection" or "access" to network elements. Nor has the Commission ever adopted any operational definition of switching that would exclude switching as performing an interconnection or access function. The function of a conventional switch is simply to open or close a circuit to direct a signal to the appropriate path for transport to another central office or point-of-presence. While an incumbent LEC switch may perform no inter-carrier connection or network access function within the contemplation of section 251, a *CLEC* switch collocated in an incumbent LEC central office clearly serves such function no less than a loop connection to the incumbent LEC switch. A collocated CLEC switch routes the CLEC signal either from or to a customer from or to other points on the incumbent LECs network, much the same way a railroad switch allows a train to access another line of the same or a different railroad.[60]

A closer examination of Commission precedent reveals that the Commission has never found – based on record evidence – that switches do not perform interconnection or network access functions. To the contrary, in its *Expanded Interconnection Orders* that preceded the 1996 Act,[61] the Commission decided against collocation of switches in incumbent LEC space – *not* because such equipment does not perform an interconnection or network access function – but rather because: (1) most interconnecting carriers preferred to place their equipment in their own space; (2) most parties agreed that there was no technical or quality advantage to collocating switches in incumbent LEC central offices; (3) the size and weight of the switches (most of which would have occupied several hundred square feet of collocation space) would lead to the

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60 *See Bell Atlantic v. FCC, supra*, 24 F.3 at 336 (analogizing interconnection to railroad switch function).

61 *See Expanded Interconnection with Local Telephone Company Facilities (Transport, Phase II)*, Third Report and Order, CC Docket No. 91-141, 9 FCC Rcd 2718 (1994) ("*Expanded Interconnection Third Report and Order*").